DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-211117.2 DATE: October 24, 1983

MATTER OF: Technical Assistance Group, Incorporated

DIGEST:

1. There is no requirement that negotiations with offerors be in writing, and while the record suggests that all offerors may not have been given the same information regarding evaluation of travel costs, the record also makes clear no prejudice accrued to any offeror as a result.

2. The government is not obliged to compensate for the competitive advantage a firm may enjoy because of its own particular business circumstances, including incumbency under other government contracts, unless such advantage results from a preference or unfair action by the contracting agency.

3. Whether a contractor improperly manipulates staff or government-furnished space, equipment or services between different government contracts, and whether such manipulation might be grounds for default under either contract, are matters for the contracting agency to determine. GAO does not consider such matters of contract administration under its Bid Protest Procedures.

Technical Assistance Group, Incorporated protests the award of a labor-hour type contract to Consulting and Program Management Services, Inc. (CPMS) by the Employment and Training Administration, Department of Labor, under request for proposals (RFP) No. ETA-OC-83-01. The protester complains that (1) much of the pre-award communication between the agency and the offerors was not in writing, (2) the offer of CPMS had expired prior to award, (3) CPMS had a competitive advantage because it is the incumbent under another contract with the Department, (4) the

opportunity for CPMS to manipulate its staff between the two contracts might lead to default under either or both contracts, and (5) the cost proposal submitted by CPMS was deficient.

For the reasons discussed below, the protest is denied in part and dismissed in part. Two other firms have protested this award. By decisions of this date, United Food Services, Inc., B-211117 and ADC Ltd., Inc. B-211117.3, we have also denied these protests.

Oral Communications

The protester contends that because much of the pre-award communication between the agency and the offerors--including discussions and the request for best and final offers--was oral, the protester cannot be certain the agency treated all offerors fairly and equally. As an example of the confusion that the protester says resulted from the lack of written communication, it cites the agency's statement that it advised all offerors during discussions that it would add a lump sum for travel to the best and final offer of the awardee. The protester denies it was so informed.

There is no requirement that negotiations with offerors be in writing. The regulations governing the conduct of negotiations provide that either oral discussions or written communications shall be conducted with offerors to resolve uncertainties. See Federal Procurement Regulations § 1-3.804. Even where regulations require a writing--see, for example, Defense Acquisition Regulation § 3-805.3(d), requiring written confirmation of an oral request for best and final offers--the lack of written correspondence will not result in the disturbance of an award where all offerors in the competitive range are afforded an opportunity to compete on a common basis. See Kleen-Rite Corporation, B-209474, May 16, 1983, 83-1 CPD 512. Thus, the critical inquiry is not whether discussions and other communication with offerors were in writing, but, rather, whether the competition was conducted on an equal basis.

In this case, the only evidence that the offerors might not have been competing on an equal basis concerns

the agency's intent to add a lump sum for travel.[1] The protester disputes the agency's assertion that it advised all offerors during discussions of this intent, and notes that its cost proposal did provide an amount for travel. In addition, from our review of the cost proposals, we note that the third offeror in the competitive range also included an amount for travel, but that the awardee, CPMS, did not. The fact that two of the three offerors within the competitive range provided for the costs of travel may support the protester's position regarding the information actually provided the offerors during discussions. Even if all offerors were not informed of the plan to add a lump sum for travel, however, our review of the cost proposals indicates that no offeror was prejudiced by this alleged deficiency. When the amounts indicated for travel and per diem are removed from the best and final offers of those offerors that included such amounts, the offer of CPMS still remains low.

Expired offer

The protester alleges that the agency could not validly make an award to CPMS because the 90-day acceptance period specified in CPMS' offer had expired. The agency reports, however, that CPMS provided a 30-day extension for accepting its offer. Because the record shows that award was made within the acceptance period as extended, we deny this aspect of the protest.

Competitive advantage; Manipulation of staff

The protester contends that CPMS enjoyed a competitive advantage in this procurement because, as incumbent under another contract with the Department, it has access to government-furnished space, equipment and services, and

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[1]The RFP provided that the contractor would be reimbursed the actual transportation costs and per diem for those of its employees required to travel. The purpose of adding a lump sum for travel to the best and final offer of the successful offeror was to establish a contract ceiling price and to fix the amount of funds that would be obligated upon award of the contract.

is in a position to "manipulate" its staff between the two contracts. The protester adds that such manipulation of staff might cause CPMS to default under either or both contracts.

The government is not obliged to compensate for the competitive advantage a firm may enjoy in a procurement because of its own particular business circumstances, including incumbency under other government contracts, unless such advantage results from a preference or unfair action by the contracting agency. Systems Engineering Associates Corporation, B-208439, January 31, 1983, 83-1 CPD 97. The protester here has presented no evidence of a preference or other unfair action on the part of the agency.

In addition, there is nothing in the record to indicate that CPMS is to be given access to government facilities not offered to the other competitors in the performance of the contract, and our review of CPMS' cost proposal shows that its hourly rates include factors for rent and office expenses just as do those of the other offerors. Also, since the contract for property management services is a labor-hour type contract, CPMS will be paid only for those staff hours properly allocable to that contract. This serves to guard against the kind of manipulation that the protester says may occur between the two CPMS contracts. In any event, whether such manipulation does occur, and the extent to which it might constitute grounds for default, are matters for the contracting agency to determine. This Office does not consider such matters of contract administration under its Bid Protest Procedures. 4 C.F.R. § 21.3(g)(1), as added by 48 Fed. Reg. 1931 (1983). We dismiss this aspect of the protest.

Cost proposal deficiencies

Finally, the protester states that, based on its review of CPMS' proposal, it appears that the hourly rates quoted by CPMS did not provide for staff fringe benefits as required by the RFP. The protester complains further that CPMS did not provide for items such as rent, telephone and postage, and suggests this indicates that CPMS plans on using government space, equipment and services.

We reviewed the revised cost proposal submitted by CPMS, and especially an attachment containing a breakdown of the overhead and general and administrative costs. The attachment, which the agency apparently did not provide the protester, indicates that CPMS' overhead cost did provide for such fringe benefits as vacation, holiday and sick leave. In addition, as indicated above, the attachment indicates that CPMS' general and administrative costs included all of the items for which the protester alleges CPMS did not provide. Thus, the record does not support the protester's allegations that the cost proposal CPMS submitted was deficient. In any event, the contractor is obligated to supply the services at the rate it has proposed no matter what items it has actually included in that rate.

The protest is denied in part and dismissed in part.

Milton J. Socolar
for Comptroller General
of the United States